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SUBJECT: ICJ CASES WEAVE DANGEROUS WEB

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¶1. (SBU) SUMMARY AND COMMENT: In light of recent local media reports on Bosnia and Herzegovina's case against Serbia and Montenegro before the International Court of Justice (ICJ) and speculation regarding a possible future BiH case against Croatia, PolOff met March 15 with Professor Ivan Simonovic, deputy dean of the Zagreb law faculty and Croatia's agent before the ICJ. Simonovic sees little likelihood of a BiH case against Croatia, but as former deputy foreign minister he expressed grave concern about the impact on regional stability of any verdict in the BiH v. SaM case. He called on the international community to encourage Sarajevo and Belgrade to reach a settlement rather than proceeding with the case and forcing an ICJ verdict. Croatia's strategy regarding its ICJ case against SaM depends upon how the BiH v. SaM case is resolved. Post would welcome perspectives from Embassies Sarajevo and Belgrade. END SUMMARY AND COMMENT.

BiH v. CROATIA?: HIGHLY UNLIKELY

¶2. (SBU) Simonovic thinks it is highly unlikely that the BiH government would choose to bring a case against Croatia before the ICJ. He cited a joint statement he made several years ago with BiH's former ICJ agent Muhamed Sacerbey declaring that the two states would legally cooperate in ICJ cases as victims of the same aggressor. While this statement is not legally binding on current governments, Simonovic said it would carry some weight before the court. He did not give the impression that Croatia was preparing to defend against a BiH case or was even concerned.

BiH v. SaM: A LOSE-LOSE SITUATION

¶3. (SBU) Simonovic instead expressed grave concern over BiH's case against SaM. He said a negotiated settlement would by far be the best solution for the region. As former assistant minister of foreign affairs under the Racan government, he had pushed for a trilateral settlement with BiH and SaM but was unsuccessful due to politicization of the cases, particularly in Sarajevo, he said. He speculated that Milosevic's death has probably only increased pressure on the BiH government to go through with the case since now there will never be an ICTY verdict against him. He is convinced BiH would never agree to a settlement without outside pressure because leaders are not aware of or are unwilling to accept the very large possibility they will lose the case. He thinks the current BiH agent before the ICJ does not know

what he is doing (please protect) and has not informed BiH leaders of the risks in the case.

¶4. (SBU) Absent an out-of-court settlement, Simonovic sees only negative outcomes. If the court rules against SaM, it will be first time in history a state has been found guilty of genocide. A settlement would allow SaM to admit guilt without admitting genocide and it could squarely blame the Milosevic regime, while an ICJ verdict of genocide would be against the state -- a condemnation that he said will last for 20 generations. He fears this would feed radical elements in Serbia and perpetuate the myth of Serb victimhood.

¶5. (SBU) Equally likely in Simonovic's eyes is that BiH will essentially lose the case against SaM with an ICJ decision that it is outside of its jurisdiction as it did in SaM's case against NATO member states. While the ICJ previously ruled that it does have jurisdiction in the BiH v. SaM case, the question is open again after the NATO verdict, in which the court found it did not have jurisdiction because SaM (Federal Republic of Yugoslavia (FRY) at the time) was not considered a member of the U.N. at the time of the events. Thanks to a complex and quirky sequence of events at the U.N., this "fact" was not clear at the time the court ruled that it had jurisdiction in BiH's case. The court is now reconsidering the jurisdiction question in the course of main case, according to Simonovic, and if it follows the same logic it did in the NATO case, there is a very real chance the case will be thrown out. Simonovic believes a "no jurisdiction" decision will radicalize Bosnian Muslims frustrated in their search for justice and embolden Serbian nationalists, who will interpret it as an acquittal.

¶6. (SBU) According to Simonovic, hearings in the BiH v. SaM case will end May 9 and a verdict will follow in a matter of weeks/months. He believes the case will be decided by one or two votes (the SaM v. NATO member states case was decided by one vote with a strong dissenting opinion). He stressed that

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the ICJ will have to resolve the contradictions in jurisdiction between the NATO and BiH cases in this ruling.

CROATIA v. SaM: WAIT AND SEE

¶7. (SBU) While Croatia remains open to a settlement (with more interest in political satisfaction than in monetary reparations) and will drop its case if the ICJ finds it does not have jurisdiction in the BiH case, it may be politically difficult for Croatia not to proceed if BiH wins its case, Simonovic said. However, there is a possibility that the ICJ, in its BiH ruling, will accept jurisdiction only beginning April 27, 1992, the date FRY was established. This would mean the worst atrocities committed on Croatian territory (i.e. Vukovar) would not be considered, greatly weakening Croatia's case.

¶8. (SBU) While BiH filed its case in 1993, Simonovic said, Croatia did not file until 1999, and only then after being convinced by an American attorney that accusations of SaM responsibility for genocide against Serbs on Croatian territory would paralyze cases against Croatians at the International Criminal Tribunal for the former Yugoslavia (ICTY). While the logic is nonsensical, that element also presented legal dangers and Simonovic removed it from the case as soon as he was appointed Croatia's agent. He said keeping that accusation in the case would have allowed SaM, in a likely countersuit, to show that Croatia was admitting genocide had taken place against Serbs on Croatian territory. The only factor in dispute would be who had committed that genocide.

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